

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE**

HON. KWAME M. KILPATRICK,

Plaintiff,

v.

HON. JENNIFER M. GRANHOLM,  
in her official capacity as Governor of the State of Michigan,

Defendant.

08-122051-CZ    8/28/2008  
JDG: ROBERT L ZIOLKOWSKI  
KILPATRICK KWAME M HON  
VS  
GRANHOLM JENNIFER M HON

**SECOND SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

This is an unprecedented case. The twice-elected Mayor of the City of Detroit, Kwame M. Kilpatrick ("Kilpatrick") is facing concurrent judicial or quasi-judicial proceedings in four separate forums, stemming from charges brought by two different law enforcement agencies and a legislative body. It is well-settled that Kilpatrick's constitutional rights to due process, the privilege against self-incrimination and his right to have his case heard by a jury of peers will be protected in his criminal proceedings. Unfortunately, months before those proceedings will begin, Kilpatrick will face removal from office based upon some of the same alleged conduct underlying the criminal charges, but in a forum where he will be deprived of the most fundamental of rights – the right to a fair and just proceeding, which is guaranteed him by the Michigan Constitution. This Court must exercise its authority and obligation to uphold the provisions of the Michigan Constitution. The undeniably unfair and unjust removal proceedings must be enjoined.

## **I. This Court Has Jurisdiction Over Plaintiff's Complaint**

Contrary to the Governor's and City Council's assertions, the Court absolutely has jurisdiction to hear this case. At issue are Kilpatrick's rights under the Michigan Constitution to a fair and just proceeding. The Michigan Supreme Court made plain in *Metevier v. Therrien*, 80 Mich. 187, 195 (1890) that a

governor cannot by any act of his own enlarge the power granted him by the legislature; nor can the legislature by any act deprive a person of a right to hold an office to which he had been elected or appointed, and whose duties he has assumed, except by constitutional methods, by due process of law. The governor cannot foreclose the right of the courts to preserve to such officers their constitutional rights.

It could not be more clear that simply because a governor is vested with the power to remove an elected city official, she is not empowered to do so at the expense of her subject's constitutional rights. Kilpatrick must have some venue to turn to in order to seek protection from the Governor's violation of those rights, and that venue can only be this Court.

The doctrine of separation of powers does not require that one branch of the government sit idly by as another branch ignores the provisions of the Michigan Constitution. Nowhere is this made more clear than in the Michigan Supreme Court's opinion in *Bubak v. Romney*, 380 Mich. 209, (Mich. 1968). In *Bubak*, the Governor had delegated her fact finding role in removal proceedings to probate judges. In a suit brought prior to the removal hearing, the Michigan Supreme Court held that such a delegation of duties was not in conformity with the Michigan Constitution. Even though the court recognized that its intervention into the executive function should be "exceedingly limited," the court also understood that the question of the constitutionality of a governor's exercise of the removal power must be addressed by the courts.

The present case is no different.

This Court has not only the authority, but an obligation to put a stop to unfair and unjust proceedings that clearly violate Kilpatrick's constitutional rights. Where the Governor seeks to act outside the bounds of the constitutional protections so clearly afforded by the fair and just treatment clause, there can be no question that the Court must intervene to assure that such rights are not infringed. To hold otherwise would allow the Governor to ignore the strictures of the constitution with impunity and would deprive those whose rights are violated of any remedy.

## **II. The Doctrine Of Necessity Does Not Require That The Governor Hold Removal Hearings**

The common law rule of necessity does not compel the Governor, who has shown bias and prejudgment of the issues, to proceed with the removal hearing.<sup>1</sup> The rule of necessity, as applied to adjudicative officers, provides that they are not disqualified because of bias, prejudice or prejudgment of the issues where they alone have the power and authority to act and where, if they were to be disqualified, action cannot otherwise be taken and a failure of justice would result. *Acme Brick Co. v. Missouri Pacific Railroad Co.*, 821 S.W.2d 7, 10 (Ark. 1991). Such is not the case here because the Governor's removal hearing is not the only means by which the Detroit City Council can achieve their goal. Instead, as this Court previously ruled, the City Council can act in accordance with their own procedures in order to attempt to remove Kilpatrick from office.

The concept of "necessity" is to be construed narrowly, in favor of delegating judicial authority to others whenever possible. *In the Matter of General Motors Corp. v. Rosa*, 624 N.E.2d 142, 145 (N.Y. 1993). The doctrine of necessity should only be invoked in those

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<sup>1</sup> The Governor's reliance on the doctrine of necessity as applied in *United States v. Will*, 449 U.S. 200 (1980) and *Evans v. Gore*, 253 U.S. 245 (1920) is misplaced. Both of these cases pertain specifically to judges' personal pecuniary interests in the outcome of the cases. *See Will*, 449 U.S. 200 (considering whether the judges had a duty to recuse themselves because the case pertained to the level of compensation the judges were to receive); *Evans* (finding that the plaintiff judge was entitled to bring an action related to his own compensation). To the contrary, Kilpatrick alleges that the Governor is unfairly biased such that a failure of justice would result if she were to act as a fact finder in Kilpatrick's hearing.

instances where the matter cannot be set aside until a later date, and there is no alternative forum able to grant the same relief. *Allen v. Toms River Regional Bd. of Education*, 559 A.2d 883, 887-88 (N.J. Super. Ct. 1989). Because the Detroit City Council can achieve the same result by using their own procedures, the doctrine of necessity does not save the Governor's hearing. Moreover, the Governor herself could easily stay the proceedings before her pending the outcome of Kilpatrick's criminal trial, which regardless of outcome, would resolve the question of removal altogether.

### CONCLUSION

For all of the foregoing reasons, and the reasons set forth in Plaintiff's Memorandum of Law and Supplemental Memorandum of Law, Plaintiff respectfully requests this Court to grant his Emergency Motion for Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,



*Attorneys for Plaintiff*

James C. Thomas, PC (P23801)

Joseph Niskar (P55538)

Michael Naughton (P70856)

Attorney at Law

535 Griswold St., Suite 263

Detroit, MI 48226

WINSTON & STRAWN

DAN K. WEBB

35 W. Wacker Dr. #4200

Chicago, IL 60601

(312) 558-5600

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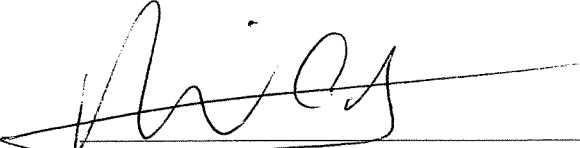
Defendant.

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**PROOF OF SERVICE**

The undersigned hereby states that on August 29, 2008, she served a copy of Second Supplemental Memorandum of Law in Support of Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction and this Proof of Service upon Kelly G. Keenan, Legal Counsel to the Governor, 111 S. Capitol Avenue, Lansing, MI 48909 via first class mail and via electronic mail at [keenank@michigan.gov](mailto:keenank@michigan.gov) and upon William H. Goodman, 1394 E. Jefferson, Detroit, MI 48207 via first class mail and via electronic mail at [bgoodman@goodmanhurwitz.com](mailto:bgoodman@goodmanhurwitz.com)

I declare, under the penalty of perjury, that the above information is true to the best of my knowledge, information and belief.

  
MICHAEL C. NAUGHTON